

TENTATIVE RULING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. 3-07-70312 EDL (BZ)
)	
v.)	ORDER DENYING DEFENDANT
)	KANG'S MOTION TO DISMISS
EDWARD KANG,)	
)	
Defendant.)	
_____)	

On May 30, 2007, FBI agents arrested Edward Kang without a warrant on a charge of conspiring to commit bank robbery. On May 31, FBI agent Guy swore out a criminal complaint before Magistrate Judge Laporte, who found probable cause for the arrest. At his initial appearance that day, Judge Laporte scheduled a hearing on the government's motion to detain Mr. Kang before the magistrate judge presiding over the criminal calendar on June 7, 2007. Mr. Kang and then noticed a motion to dismiss the complaint for lack of probable cause for that same date.

After reviewing the motion, I asked counsel for both parties to submit authority on the issue of whether defendant may pursue such a motion prior to preliminary hearing. Neither side produced any authority directly on point, and my own research failed to disclose any. Defendant relies on

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Federal Rule of Criminal Procedure 12(b)(3)(A), which authorizes pretrial motions concerning "defect[s] in instituting the prosecution," and U.S. v. Fernandez-Guzman, 577 F.2d 1093 (7th Cir. 1978).

Having considered the matter, I conclude for a number of reasons that there is no basis for filing a motion to dismiss a complaint for failing to contain probable cause for the arrest, prior to the expiration of the ten day period provided in Rule 5.1 for a preliminary hearing or indictment. First, Fernandez-Guzman affirmed a trial court's ruling denying a motion to suppress evidence where the arrest was based on probable cause even if the complaint filed under Rule 5 was defective. Citing Gerstein v. Pugh, 420 U.S. 103, Fernandez-Guzman recognizes that the "Fourth Amendment demands a prompt judicial determination of probable cause in order to test continued detention before trial." 577 F.2d at 1097. Here Judge Laporte made such a determination when she signed the complaint. What defendant is seeking is essentially an appeal of her finding.

Second, there does not appear to be any good reason to create such a motion. I find it significant that no reported case that the parties or I have been able to locate has recognized such a motion. I expect this is because a defendant who has been arrested on less than probable cause is adequately protected by the requirement that within ten days of his initial appearance, a magistrate judge or a grand jury must find probable cause to believe an offense was committed.

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As a practical matter, in most cases it would be difficult to have a motion heard much before the preliminary hearing.¹

There seems little reason to create a non-statutory motion when the law already provides a means of assuring that a defendant is not long detained if there is no probable cause for the detention.

Finally, even assuming that one magistrate judge could review another magistrate judge's probable cause determination, it does not appear that a magistrate judge has the authority to dismiss a criminal complaint over the government's objection. 28 U.S.C. § 636(b)(1)(A) states:

"Notwithstanding any provision of law to the contrary -- a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion . . . to dismiss or quash an indictment or information made by the defendant . . . and to involuntarily dismiss an action."

For these reasons, defendant's motion to dismiss is denied. A preliminary hearing will be scheduled at the detention hearing.

Dated: June 6, 2007

Bernard Zimmerman
United States Magistrate Judge

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¹ Defendant belatedly requested an order shortening time to consider his motion. See Defendant Kang's Supplemental Memorandum Re: Motion to Dismiss, at 2 n.1. No opposition having been filed, the request is **GRANTED**.